Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Of Counsel

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While respondents Arthur Andersen & Co. and Herman L. Meckler, in their joint Brief in Opposition to the Petition, cite this Court's recent decision in Kerr v. United States District Court, 426 U.S. 394 (1976), they fail to cite the crucial language on the dispositive issue herein:

> As a means of implementing the rule that the writ [of mandamus] will issue only in extraordinary circumstances, we have set forth various conditions to its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the

relief he desires, Roche v. Evaporated Milk Assn., 319 U.S. [21], at 26 [(1943), cited in Petition, pp. 7-8] . . . .

— 426 U.S. at 403
(emphasis added)

In Kerr, this Court affirmed the Court of Appeals' denial of the writ, specifically on the ground that the petitioners there had available to them "an alternative, less extreme, path" to the relief they sought. 426 U.S. at 396.

It is even clearer here that the present respondents are not in the position of having "no other adequate means to attain the relief" they desire; if an adverse verdict is returned, it may be reviewed by the Court of Appeals in the usual course in a matter of weeks or months.* Thus Kerr, far from supporting the respondents' position, dictates the reversal of the Court of Appeals' action which petitioners seek.

* This fact also distinguishes other cases relied on by respondents, including Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976); Schlagenhauf v. Holder, 379 U.S. 104 (1964); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); and United States v. Newman, No. 76-3077 (2d Cir. Jan. 25, 1977), since in each of these cases, regular appellate review of the trial judge's challenged action was either totally unavailable or available only far in the future.

Respondent Empire National Bank, in its Brief in Opposition, makes various speculative claims that it will be "prejudiced" if the Court of Appeals is reversed. These assertions are entitled to no weight at all in the present posture of the case. For they are premised on the inadmissible assumption that the trial judge — who has lived with this jury during six-and-one-half months of trial — will not couch the proposed five-sixths charge in appropriate language to prevent confusion or "prejudice."* Although the fact my be obvious, it bears emphasis that the charge has not yet been given: therefore no-one — not respondents, not the Court of Appeals** — knows exactly what the trial judge will say.

This Court has expressed its confidence in the ability of District Judges to gauge the impact of a

* The trial judge has specifically indicated on the record his awareness of the need to couch the charge in non-"coercive" language. See Trial Tr., p. 14123 (in part II of the Appendix to Petitioners' Motion for Expedited Consideration).

** The Court of Appeal's vituperative statement that the trial judge proposes to adopt an "expedient" to "extract a verdict at any cost" — seized on by respondents in their Briefs — thus simply has no basis in the record. See Petition, pp. 12-13.

charge on a jury, and its doubts about the wisdom of a Court of Appeals substituting its judgment on such a matter which is "certainly more evident in the living scene than in a cold record" — even when the Court of Appeals had acted on a full record after verdict. United States v. Bayer, 331 U.S. 532, 536-37 (1947); see United States v. Park, 421 U.S. 658, 674-76 (1975); cf. Illinois v. Somerville, 410 U.S. 458, 462-64 (1973). A fortiori, the Court of Appeals' intrusion into an as-yet uncompleted trial here, to strike down an as-yet undelivered charge, cannot be justified.

This Court, in the exercise of its supervisory powers over the inferior federal courts, and to protect its own jurisdiction in this case (see Petition, p. 10), must act now to confine the Court of Appeals to its very limited jurisdiction under 28 U.S.C. § 1651(a) by reversing forthwith that Court's hasty

and unjustifiable issuance of the extraordinary writ of mandamus.

Respectfully submitted,

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